Wilson Tree Company, Inc. *and* International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO–CLC, and its Local 732. Cases 9–CA–29270 and 9–CA–29511

September 30, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On December 2, 1992, Administrative Law Judge Walter H. Maloney issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] as modified below, and to adopt the recommended Order as modified.

1. The judge found, among other things, that the Respondent is a successor employer to Asplundh Tree Expert Co. (Asplundh) and that it violated Section 8(a)(5) of the Act by failing to recognize and bargain with the Union on January 10, 1992, the date on which the Respondent employed a representative complement of employees, the majority of whom were previously employed by Asplundh and represented by the Union. On February 16, 1993, the Union filed a motion seeking to withdraw the 8(a)(5) portion of the charge in Case 9–CA–29270, which alleges that the Respondent is a successor employer and that it refused to recognize and bargain with the Union. As the motion is not opposed, we shall grant it and dismiss the corresponding allegations of the complaint and modify the recommended Order and notice to employees accordingly.[3]

In granting the motion to withdraw part of the charge, we note that the motion was filed by the Union and that it was confined to 8(a)(5) allegations which sought to seat the Union as the bargaining representative. In essence, the Union does not now seek representation. We also note that the Respondent's unfair labor practices under Section 8(a)(1) and (3) are being effectively remedied. Finally, the situation in *Wells Fargo*, 290 NLRB 936 fn. 1 (1988), cited by our dissenting colleague, is clearly distinguishable in two critical respects. In that case, the respondent filed the motion to dismiss, and the General Counsel affirmatively opposed it.

2. The judge found that the Respondent violated Section 8(a)(3) by discriminatorily refusing to hire Union Vice President Galen Clay in 1992, when it began right-of-way maintenance operations previously performed by Asplundh pursuant to a contract with Appalachian Power Company (APCO). As explained below, however, we find that the Respondent would not have hired Clay even absent his union activism and leadership, and therefore, that it did not violate the Act with respect to him.

The Respondent trims, cuts, and removes trees and brush growing near power lines in three ''divisions''

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Additionally, the Respondent's exceptions implicitly allege that the judge's findings are a result of bias. After a careful examination of the entire record, we are satisfied that this allegation is without merit.

The judge states in sec. I,B,4 of his decision that Brian Messer resigned from the Union ''only after [general foreman] Spry spoke to him a second time and Adams told him that it could cost him his job if he did not do so.'' In fact, Messer testified that it was General Foreman Lando Adkins who told him failure to resign could cost him his job. The judge's inadvertent error does not affect his finding that the conduct violates Sec. 8(a)(1).

[2] The judge found that the Respondent violated Sec. 8(a)(1) by the November and December 1991 conduct of its agent, Asplundh General Foreman Michael Bolen. Although there is ample evidence to establish Bolen's agency status during December, as found by the judge, the record fails to establish that he was the Respondent's agent in November. However, as the November conduct was repeated or referred to by Bolen during conversations in December which were also found unlawful, we find it unnecessary to rely separately on or to further consider the November incidents or to modify the judge's recommended Order.

[3] Chairman Stephens would deny the Union's motion to withdraw the 8(a)(5) charge in the instant matter. The memorandum in support of the motion states that it is submitted because of ''the untenable position'' in which the Union has been placed due to the length of time that has elapsed since the Respondent refused to recognize and bargain with it and the time that will elapse before the matter is ultimately resolved. The memorandum also notes that ''[t]he employees in the unit have become disillusioned with the [Union] and the progress it is making in representing them.'' It is apparent from these references that the motion to withdraw is not in furtherance of any mutual resolution of the instant labor dispute. Inasmuch as the Chairman agrees with the judge's findings that the Respondent violated Sec. 8(a)(5) by refusing to recognize and bargain with the Union and by soliciting employees to resign from the Union, and inasmuch as employee disillusionment is the direct and foreseeable result of such unlawful conduct, the Chairman finds that the policies of the Act would best be served by putting the employees on notice, through the instant Decision and Order, that their right to representation by the Union was unlawfully abridged by the Respondent. Thereafter, if the Union desires to disclaim its interest in representing the employees, the Chairman would entertain an appropriate motion. *Wells Fargo Armored Service Corp.*, 290 NLRB 936 fn. 1 (1988) (new evidence of union's disclaimer of interest admitted and order to bargain modified appropriately, but employer's motion to dismiss complaint as moot denied; union's disclaimer did not negate judge's finding that employer violated the Act and employees entitled to an order and notice ''for without such their Sec. 7 rights will have been chilled''). The Chairman further notes that the General Counsel has not acted in support of the Union's motion.

in West Virginia pursuant to a contract with APCO.[4] In mid-December 1991, after being awarded the contract, the Respondent conducted a series of interviews with Asplundh employees who were then performing the line clearance work.[5] Clay, an Asplundh crew leader in the Beckley division, was among the many Asplundh employees who applied for employment with the Respondent. His application indicates that he applied for a position as a crew leader. Clay had approximately 20 years of experience in the industry and had previously worked for Wilson from 1984 through 1987 when it held the APCO contract prior to the time it was awarded to Asplundh. It was well known among Asplundh's and the Respondent's personnel that Clay would not climb trees because heights made him dizzy. He testified that he refused to climb trees for this reason and related that he once got dizzy while working in a ''bucket'' (i.e., a lift). The Respondent asserts that Clay was denied employment because of his refusal or inability to climb and not because of his union activity.

The Respondent's division manager, Johnny Griffin, and Area Manager Paul Chamblis testified that the qualifications considered for employment were a good driving record, years of experience, and residence in or near the division. Additionally, although the Respondent apparently had not insisted that all employees be able to climb when it held the line clearance contract previously, by 1992 it had imposed a requirement, set forth in its standard employment application, that all employees be able to climb at least 50 feet as a condition of employment. Chamblis explained that the requirement was implemented primarily for safety reasons in that the crews work around dangerous electrical lines and it was necessary to have people who were able to climb trees in case somebody got ''in trouble'' and had to be helped down from a tree. Griffin testified similarly. In addition, the Respondent cited a provision in its contract with APCO as a reason for implementing the requirement. The provision, which sets forth the responsibilities for the crew classifications of groundperson, trimmer, and working crew leader, states that a groundperson shall be able to, among other things, trim trees under direction. It further states that trimmers must be able to perform all the duties of a groundperson and ''climb a tree and trim it using a rope and saddle and/or three climbers [and] operate an aerial lift device and associated tools if working on a bucket crew,'' and that working crew leaders must be able to perform all the duties of a trimmer and a groundperson.

The judge tacitly credited Griffin's and Chamblis' testimony regarding the existence of the climbing requirement, although he described the asserted safety basis for it as a ''thin justification'' since crews are composed of ''several individuals, most of whom are able to climb.''[6] The judge rejected as pretextual the Respondent's defense that Clay was not hired because he would not climb and found that he was denied employment because he was a union activist and a leading union official. In concluding that Clay was discriminatorily denied employment, the judge noted that Clay could have been offered a position on the Respondent's summer brush spraying crews, where it had employed individuals who do no climbing and are never asked to climb, and found that the climbing requirement was disparately applied to Clay.

The judge's analysis, however, disregards not only the fact that Clay applied for a position as a crew leader, but also his own finding that the climbing requirement had at least some justification.[7] Additionally, we find that the judge erred in concluding that the requirement was disparately applied to Clay. Ray Mendez, who had worked for Asplundh for 10 years as a groundperson, testified that when General Foreman Roy Spry telephoned him about employment with the Respondent in the Logan division in February 1992, Spry told him that the only way he could go to work was to say that he was willing to climb. Mendez told Spry that he would rather not climb, and Spry reiterated that he had to be willing to do so in order to be hired. Mendez not only told Spry that he would climb if he had to, he also subsequently climbed two small trees, trimming one and ''[tying] one off.'' Thus, the only other evidence concerning an employee's known or avowed aversion to climbing trees establishes that the employee expressed a willingness to climb, albeit reluctantly, as a condition of employment and that he actually demonstrated his willingness to do so. Clay, by his own admission, consistently indicated that he would not climb. The General Counsel has failed to establish that the Respondent's imposition of a uniform requirement that its employees be required to climb was disparately applied to Clay because of his activism or leadership role in the Union.[8] On the basis of the foregoing, we find that the Respondent would not have hired Clay regardless of his union activities and not-

[4] APCO has partitioned the State into five administrative divisions and awards line clearance contracts on a division-by-division basis.

[5] The record indicates that it is a common practice in the industry for contractors to hire their predecessors' employees.

[6] Most tree-trimming crews are composed of four individuals, including the crew leader.

[7] We disagree that such justification was ''thin'' and we note that on a four-person crew, if the groundperson is learning to climb or does little climbing, then it is even more imperative that the other members of the crew be adept at climbing in the event of an emergency.

[8] Nothing in our comparison of Mendez' situation with Clay's is meant to invalidate the judge's finding that the Respondent unlawfully discriminated against Mendez by delaying hiring him until February. For all of the reasons stated by the judge, we agree that the Respondent hired inexperienced individuals before offering employment to 10-year veteran Mendez and certain other employees because they were or had been union stewards and trustees.

withstanding the Respondent's union animus. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

3. In affirming the judge's findings as they relate to crew leaders, we note our agreement with the judge's preliminary finding that the Respondent's crew leaders (whom the Respondent also termed crew chiefs or crew foremen) are not supervisors within the meaning of Section 2(11) of the Act.[9] In agreeing with his finding, we affirm his analysis except for that part which states that ''there must be actual exercise of supervisory authority to invest an individual with statutory supervisory status.'' It is well settled that ''it is the authority to act independently that is determinative [of supervisory status] rather than the exercise of that authority.'' *Groves Truck & Trailer*, 281 NLRB 1194 fn. 1 (1986). Notwithstanding the judge's misstatement, the record fails to establish that crew leaders at the relevant times possessed the requisite authority to exercise independent judgment in the course of performing their duties or make effective recommendations.[10]

In examining the status of crew leaders, we emphasize initially that we need only resolve their status as of the end of January, by which time the Respondent had hired a representative complement of employees, begun operations, and had engaged in the types of conduct here in issue.[11] Concededly, the Respondent's personnel manual ostensibly gives crew chiefs the authority to hire, discharge, and direct employees.[12] However, the record affirmatively establishes that crew chiefs did not have authority to act independently in these matters. During the relevant time period, as discussed infra, all hiring was done by persons other than the crew chiefs. Regarding discharge, the only evidence of such an occurrence involved James Arnett and it is clear that the decision to discharge him was made by someone other than his crew leader, Teddy Lester. On the day that Arnett was dismissed, Lester informed him: ''I was told to let you go. It ain't got nothing to do with your work or anything like that. I was just told to let you go.''

Although the crew leaders do direct the work of their crew, there is no evidence that, in connection with these duties, they use independent judgment as required by Section 2(11). Tree trimming and brush cutting are routine tasks, the work is relatively unskilled, and most of the employees have many years of experience in this line of work. Regarding discipline, the Respondent presented a large number of ''Status-Warning-Termination Notice'' reporting slips completed by crew leaders and the general foremen. These forms, however, are not relevant to the crew leaders' status in January, because the earliest one was completed on February 24, after the 8(a)(5) and (3) charges were filed in this case.[13]

The credited testimony establishes that general foremen spend a considerable amount of time with the crews—up to 2 hours 2 to 5 days a week. Additionally, we note that although APCO requires that supervisors be issued pagers, crew leaders were not issued them. Lastly, crew leaders are hourly paid, as are the rest of the crew members. On the basis of all of the foregoing and the judge's analysis, we find that the Respondent's crew leaders were not supervisors within the meaning of Section 2(11) during the relevant period.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Wilson Tree Company, Inc., Beckley, Bluefield, and Logan, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(g) and reletter the subsequent paragraph.

2. Substitute the following for paragraph 2(a).

''(a) Offer to Ray Reed and James L. Arnett, respectively, full and immediate employment and reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent employment, without prejudice to their seniority or any other rights they

[9] The status of crew leaders impacts on alleged 8(a)(1) activity directed at crew leaders, the failure to hire Ray Reed as crew leader, and the obligation of the Respondent to recognize the Union as the representative of employees in a unit including crew leaders.

Although we find that crew chiefs, as a class, are employees rather than supervisors, we find that one crew chief, Jeffrey Donathan, is a supervisor. The judge found that Donathan hired two employees without consultation with higher authority and, therefore, he ''might well be a supervisor.'' We conclude that, on this evidence, Donathan is a Sec. 2(11) supervisor. Thus, the term ''crew chief,'' as used below, does not include Donathan.

On one occasion, Donathan solicited his crew to resign their union membership. We do not pass on whether Donathan's conduct in this regard violated Sec. 8(a)(1) since it was not so alleged by the General Counsel and would be cumulative of other findings of unlawful solicitations, by the Respondent's representatives, that employees resign their union membership.

[10] As the party seeking to establish the crew leaders' purported supervisory status, the Respondent bears the burden of proving that they possessed the requisite indicia of supervisory status. See, e.g., *Commercial Movers*, 240 NLRB 288, 290 (1979).

[11] See fn. 9, above. Although there is evidence that the Respondent solicited crew leaders to resign their union membership on dates subsequent to January, the judge declined to rule that each such solicitation was a separate violation, so that the crew leaders' status at these subsequent times has no affect on the judge's overall finding of unlawful solicitation to resign union membership.

[12] See fn. 12 of the judge's decision.

[13] We further note that almost all of these reporting slips were introduced without the supporting testimony of the 29 crew leaders who had filled them out, that many are patently not disciplinary in nature, and that those that do appear to bear on discipline do not provide any indication whether the crew leaders exercised independent discretion in filling them out.

have previously enjoyed, and make them and Ray Mendez, Daniel Harris, Bill Dean Collins, Bruce Collins, and Charles Simmons whole for any loss of pay or benefits suffered by reason of the discrimination found in the manner described in the remedy section of the decision.

3. Delete paragraph 2(b) and reletter the subsequent paragraphs.

4. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT coercively interrogate employees concerning their union activities or the union activities of other employees.

WE WILL NOT solicit employees to resign from a labor organization.

WE WILL NOT tell employees that they or other employees will not be hired because they have engaged in union activities or protected concerted activities.

WE WILL NOT tell employees that we will not bargain with the Union under any circumstances.

WE WILL NOT engage in the surveillance of the union activities of our employees.

WE WILL NOT discharge, refuse to hire, or delay the hiring of employees or otherwise discriminate against them in their hire or tenure in order to discourage their membership in and activities on behalf of International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO–CLC, and its Local 732 or any other labor organization.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 the Act. These rights include the right to form, join, or assist labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for their mutual aid and protection.

WE WILL offer employment and full and immediate reinstatement, respectively, to Ray Reed and James L. Arnett, to their former jobs or, if those jobs no longer exist, to substantially equivalent employment, without prejudice to their seniority or any other tights or privileges previously enjoyed, and WE WILL make them and Ray Mendez, Bill Dean Collins, Bruce Collins, and Charles Simmons whole for any loss of earnings and other benefits suffered by reason of the discrimination practiced against them, with interest.

WILSON TREE COMPANY, INC.

Deborah Jacobson and *Ursula McDonnell, Esqs.*, for the General Counsel.

John C. Wright Jr., of Philadelphia, Pennsylvania, for the Respondent.

Richard F. Rice, Esq., of Kettering, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WALTER H. MALONEY, Administrative Law Judge. This case came on for hearing before me at Beckley, West Virginia, on a consolidated unfair labor practice complaint,[1] issued by the Acting Director of the Board's Ninth Region, which alleges that Respondent Wilson Tree Company, Inc.,[2] violated Section 8(a)(1), (3), and (5) of the Act. More particularly, the complaint alleges that the Respondent coercively interrogated employees concerning their union activities, threatened to deny employment to individuals who had filed grievances or had engaged in other union acivities, repeatedly solicited employees to resign from the Union, denied employment to Ray Reed and Gaylen Clay because of their union activities, delayed hiring Ray Mendez, Daniel Harris, Bill Collins, Bruce Collins, and Charles Simmons because of their union activities and discharged James L. Arnett because of his union sentiments. The consolidated complaint further alleges that the Respondent herein was successor to the Asplundh Tree Expert Co. (Asplundh), that it was obligated to recognize and bargain with the Charging Party as the representative of its employees since the Charging Party was the certified representative of the employees of Asplundh in the same bargaining unit, and that, when it refused to do so, it was guilty of an unlawful refusal to bargain. The Respondent denies the commission of any independent violations of Section 8(a)(1) and claims that it was privileged to inform its employees of their right to withdraw from the Union. It further maintains that it refused to hire

[1] Charge filed herein by International Union of Electronic, Electrical, Salaried, Machine, and Furniture Workers, AFL–CIO–CLC, and its Local 732 (the Union) against the Respondent in Case 9–CA–29270, on January 29, 1992; complaint issued by the Acting Director, Region 9, against the Respondent in that case on March 9, 1992; Respondent's answer filed on March 19, 1992; charge filed by the Union against the Respondent in Case 9–CA–29511 on April 15, 1992; consolidated complaint issued in that case with the earlier case on April 16, 1992; Respondent's answer filed on June 15, 1992; Hearing held in Beckley, West Virginia, on August 17, 18, and 19, 1992; briefs filed with me by the General Counsel and the Respondent on or before October 5, 1992.

[2] The Respondent admits, and I find, it is a corporation which maintains its corporate office and place of business in Shelby, North Carolina, and is engaged in the tree trimming business as a contractor for electric power companies and municipalities. In the course and conduct of this business its annually performs services valued in excess of $50,000 in states other than an North Carolina. Accordingly, the Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

Reed and Clay for cause, discharged Arnett for cause, and that its delay in hiring the other individuals was merely incidental to the difficulty it experienced in starting up a new operation after taking over the responsibility for tree trimming for the Appalachian Power Company (APCO) from Asplundh. The Respondent denies that it is a successor to Asplundh and that it had any obligation to recognize the bargaining agent of the employees of its alleged predecessor. It denies the Union's majority status and claims that any such status on the part of the Union which might have been derived from its contract with Asplundh has been eroded by virtue of resignations by many employees who had worked for Asplundh. On these contentions, the issues herein were drawn.

FINDINGS OF FACT

A. *The Unfair Labor Practices Alleged*

1. Background

APCO, a regulated public utility, employs contractors to trim trees and clear brush along its rights of way in West Virginia and elsewhere.[3] In letting these contracts, APCO has divided the State of West Virginia into five divisions. Events taking place in its Beckley, Bluefield, and Logan divisions are at issue in this case. APCO awards these contracts on a 3- or 4-year basis after solicitation of bids. It is not unusual for a right-of-way maintenance company to receive a contract from APCO for a 3-year period of time, lose a bid at the end of its contract period, and then regain a contract during a subsequent contract period. This is what happened in the instant case. The Respondent was APCO's tree-trimming contractor in the mid-1980s. It lost the contract in 1987 to Asplundh, who had contracts covering all five of APCO's West Virginia divisions, and regained the contract at the end of 1991.

When contracts were subject to renewal in the fall of 1991, the Respondent submitted bids and won a contract with APCO covering three of the five West Virginia divisions. It is also an APCO contractor in various parts of Virginia.[4] It has been the custom of maintenance contractors to take over the labor force of its predecessor upon accepting a new contract. This is what happened in this instance, with some exceptions discussed hereafter. Many of the former Asplundh employees who are now working for the Respondent were also employed by the Respondent during a previous contract period.

APCO micromanages the operations of its tree-trimming contractors. Its maintenance contracts define the size of crews, the number of crews, the composition of the employees on crews,[5] the degree of supervision, the type of equipment used by contractors, and degree of communication which must be maintained between the contractor's management, APCO, and its crews. By setting contract specifications, APCO can virtually dictate wage rates and benefits paid by its contractors. During the course of a contract, APCO can bring about the enlargement or contraction of a tree-trimming operation simply by making more or less money available for that purpose at any given time. APCO also performs periodic inspections to determine the efficiency of the tree trimming operation and whether the detailed reports it receives from its contractor are correct or have been ''fudged.''

During calendar year 1991, Asplundh employed between 126 and 132 employees in the three divisions involved in this case, with slightly larger crews working during the summer months when it was engaged in brush spraying. The employees were covered by a collective-bargaining agreement between Asplundh and the Charging Party which became effective on May 14, 1990, and expired on December 31, 1991. This contract contained inter alia a union-security clause. That contract covered a bargaining unit of ''employees engaged in line clearance work in the Huntington, Charleston, Logan, Beckley, and Bluefield Divisions of Appalachian Power Company in the State of West Virginia,'' a unit for which the Charging Party had been certified on October 9, 1987, following a Board-conducted election.

2. Initial correspondence between the Union and the Respondent

When it learned that the Respondent had received a contract for tree trimming in the Logan, Beckley, and Bluefield divisions, beginning January 1, 1992, the Charging Party, through its counsel, Richard F. Rice, wrote to the Respondent, informing it of the existence of a union contract with Asplundh and asking the Respondent what its intentions were concerning the unionized employees then employed by Asplundh. In this letter, the Union claimed to be the majority representative of the Asplundh employees. On December 12, 1991, Respondent's attorney, John C. Wright Jr., wrote Rice a lengthy reply in which the Company refused to bargain with the Union unless it won a representation election. Wright claimed that the Union's contract with Asplundh had no bearing on the Respondent's obligation toward employees or applicants, denied that the Respondent was successor to Asplundh, claimed that the work it was performing for APCO was different from that performed by Asplundh,[6] and insisted that new employees would be selected by the Respondent on the basis of their qualifications. His letter went further than a simple refusal. Wright stated:

> Finally, for all the reasons stated above, Wilson believes it would be both illegal, as well as unfair to our employees both present and newly hired, to recognize our union or any union, or to apply the terms of your Asplundh contract. Wilson intends to take every *legal* step to avoid this. [Emphasis in the original.]

The Asplundh contract ended on December 31, and the Respondent began the performance of its contract during the first week of January. On January 10, Rice again wrote the Respondent on behalf of the Union, renewed his earlier request for bargaining, claimed that the Respondent was a successor to Asplundh, and that the Union represented a major-

[3] During the summer months these contractors are also assigned brush-spraying tasks. To fulfill this responsibility they normally hire extra employees who are usually laid off in the fall.

[4] The contracts for the other two divisions were won by Trees, Inc.

[5] According to the APCO contract, each crew had to have a crew chief, a trimmer, and a groundsman. This requirement was in accord with the past practice of all maintenance contractors.

[6] In this respect, Wright asserted that its contract with APCO was confidential.

ity of the employees in the Respondent's newly hired bargaining unit. The Respondent's reply, dated January 17, was again made by Wright. Again he denied successorship, denied the Union's majority status, and claimed that a number of Asplundh employees who had just been hired by the Respondent had signed written renunciations of the Union, thus eroding any claim by the Union of majority status based upon membership during the Asplundh contract. Wright submitted to Rice 18 statements purporting to be resignations from the Union on the part of former Asplundh employees. He also submitted a list of employees who had been hired to that date by the Respondent in the three West Virginia divisions it was servicing for APCO. Of this number, the Respondent listed 19 foremen who were hired to hold jobs formerly regarded as bargaining unit crew chief positions. Of the total number of 67 individuals (exclusive of salaried general foremen) whose names were on the list, some 50 were former Asplundh employees, 13 were new hires, and 5 were individuals who had been transferred to West Virginia from other operations maintained by the Respondent, presumably in Virginia. The Respondent's contract with APCO required it to have 60 percent of its total work force available for work on January 1 and 100 percent of its required complement of employees on the job by April.

3. The recruitment of employees

While it was corresponding with the Union, as indicated above, the Respondent was laying plans for hiring a work force to begin its contract on January 1. Early in December, Johnny Griffin, Respondent's division manager from its Shelby, North Carolina headquarters, came to West Virginia and met with Asplundh General Foremen Len Lucas, Denzil Cadle, Michael Bolen, and Roy Spry[7] to discuss possible future employment. All insist that no final commitment was made by the Respondent at that time to hire any of them, but in fact they were all hired and began working for the Respondent at the outset of the Respondent's contract. On December 11, these individuals, along with several of the Respondent's management personnel, met at the Hylton [sic] Hotel in Beckley with Wright, who came in from Philadelphia to discuss with them what could legally be done to keep the Respondent's operation nonunion. The following day, which coincidentally was the date of Wright's first correspondence with Rice, Wright prepared and faxed to all who had attended the Beckley meeting, including the four Asplundh general foremen, a summary of the legal advice he had given orally the previous evening. He told those who were going to undertake the interviewing of Asplundh employees that they could tell applicants that the Respondent was a nonunion company and that it intended to take all legal steps to stay that way. He gave them additional advice as to what they could and could not lawfully say to employees concerning the unionization of the Company. Wright's advice also included a statement to the effect that interviewers could tell applicants that the Respondent did not intend to recognize the Union or to abide by the Asplundh collective-bargaining agreement. The advice memo cautioned interviewers not to ask applicants about their union preference or to pressure them into responding to statements relating to the Respondent's union policies. However, should any applicant disclose that he was unhappy about the Union, an interviewer could then inform him of his right to resign and could help him write a letter of resignation. Wright went on to state that any applicant who was being considered for a position as crew foremen could be informed that the position was a supervisory position and those hired to fill those jobs would be outside the bargaining unit and beyond the protection of the Act.

Interviews of Asplundh employees who were applying for work with the Respondent took place at the Hylton Hotel in Beckley, the Friendship Inn at Chapmanville near Logan, and the Holiday Inn in Bluefield. These interviews occurred in mid-December. The format on each occasion was the same. Job applicants filled out forms which were made available by the Respondent. Many of these applicants were either illiterate or semiliterate and required assistance in filling out application forms. Individual interviews then followed. Four interviewers from company headquarters sat at a table and spoke individually with applicants as they presented themselves. After looking over the application forms and discussing company wages and benefits, a standard statement made to each applicant by an interviewer was that Wilson Tree is a nonunion company and intends to stay that way. Some witnesses credibly testified that interviewers put their own personal spin on this message and were quite emphatic on the point.[8]

General Foreman Michael Bolen was present at the Bluefield interview wearing a Wilson Tree T-shirt. He spoke with applicants who attended this meeting, provided them with the Respondent's application form, and assisted several in filling out the form. The three other general foremen—Len Lucas, Denzil Cadle, and Roy Spry—attended one or more of these interview sessions. While not wearing a company T-shirt, they performed the same service for applicants that Bolen did in Bluefield, notwithstanding the fact that they were not yet paid employees of the Respondent. Following the interviews these Asplundh general foremen met with Griffin and gave their opinions, based upon their experience as Asplundh supervisors, as to the abilities of individual Asplundh employees who were seeking jobs with the Respondent. Bolen testified that, immediately following the Bluefield interviews, he discussed job applications with Griffin. It was on this occasion that a decision was made not to hire Ray Reed, an Asplundh crew leader who was president of Local 732. Reed was one of six crew chiefs who had worked for Bolen under the Asplundh contract.

During the transition period before December 31, several Asplundh general foremen who were later hired for similar positions by the Respondent spoke with Asplundh employees concerning the future of the bargaining unit. I credit Reed's statement that, in late November l991, Bolen told him that he himself had already been hired by Wilson, that he already had been assigned a Wilson pickup truck, and stated further that Wilson was not going to accept the Union and that not

[7] Both during the Asplundh contract and at present, these individuals have been salaried supervisors whose supervisory status has never been questioned by any party.

[8] There is a sharply disputed episode recited in the testimony that, at one of the interview sessions, one interviewer spoke up loudly and, with reference to an applicant who was before him, stated that ''here's one who wants to resign from the union,'' whereupon another interviewer said, ''Sign him up.'' It is not necessary to resolve the credibility conflict regarding this asserted event.

everyone then working for Asplundh was going to be hired by Wilson. Bolen went on to tell Reed that Wilson was not going to hire people without drivers' licenses, people who had filed grievances, people who were on workmen's compensation, and whiners and crybabies. Bolen later repeated the same statement to Reed's crew that he had made personally to Reed.

Before the takeover by the Respondent, Asplundh (and later Wilson) General Foreman Len Lucas spoke with Galen Clay, the Union's secretary-treasurer and a shop steward, concerning the future of the bargaining unit. Lucas, in the process of announcing that Wilson was going to take over the APCO contract, said that the Company would be nonunion. At his job interview in Beckley, the interviewer said nothing to Clay about the Union but Clay overheard Griffin say, on this occasion, to other job applicants that the Company was nonunion and it intended to stay that way. Some time in December, Bolen spoke with an Asplundh crew before they went to work as they gathered at Woody's Quick Stop, a convenience store and gas station in Pineville. He repeated to them most of what he had said to Reed—that he had already been hired, that the new Company would not hire crybabies, persons on workmen's compensation, people who filed grievances, anyone without a driver's license, or anyone over 40 years of age.

Toward the end of the Asplundh contract, Jess Thompson and General Foreman Denzil Cadle were assigned to drive Asplundh trucks to Charleston, where they were being returned to Asplundh officials. While standing in a parking lot, Cadle asked Thompson to sign a resignation from the Union. Cadle dictated to Thompson the language of a resignation letter. Thompson wrote it down, signed it, and turned it in to Cadle.

Shortly before the changeover, Bolen spoke wtih James L. Arnett and Gene Osborne at an Exxon Station in Welch. He asked them where they were going. They said that they were looking for a job. Bolen contradicted them, accusing them of going to a union meeting. A week later, Bolen saw the same two individuals in Atwell Hollow and spoke with them in an Asplundh truck. He asked them why they had gone to a union meeting. They replied that they attended in order to find out what was going on. Arnett added that he had a family to support and that he was not going to cross a picket line. Bolen replied that both men were guaranteed a job with the Respondent and that they did not need a union because Wilson offered good enough benefits without any union intervention.

4. The beginning of the new operation

Respondent began its operations in the Logan and Bluefield divisions on January 2, 1992, and in the Beckley division on January 6. As noted previously, the total complement of employees, other than general foremen, who were in place as of January 10 was 70 or 71, about 60 percent of its contract requirement. Lucas and Cadle were employed as general foremen in the Beckley Division, Bolen in the Bluefield Division, and Roy Spry in the Logan Division. Their immediate supervisor was Paul Chamblis, the Respondent's area manager, who had previously been safety director for the Respondent. Chamblis has continued to supervise the three divisions from his home in Beckley.

The Logan division began with five or six four-man crews; approximately seven crews began work in Bluefield, most of which were four-member crews; in Beckley, operations began with five crews, although not all of them were full four-member crews.[9] By April, the Respondent had 120 employees—100 percent of its contract requirement—in place. One of the Respondent's hiring criteria for its initial group of employees was to select as trimmers (the second-rated employee on a regular four-member crew) individuals who could be promoted to crew chiefs or crew foremen, as the Respondent designated the position, after additional employees were hired and additional crews were formed. In some instances, this progression is what actually took place.

Not long after the Respondent's operation began, Chamblis visited each crew at its jobsite and spoke to them in the presence of their general foreman and crew chief. He informed each crew that they had a right to resign from the Union and that he would furnish them paper, pen or pencil, and appropriate language for inclusion in a letter of resignation. Thereafter, on another occasion, each general foreman spoke to the crews under his supervision and repeated these statements, also furnishing paper, pen or pencil, and appropriate language for a letter of resignation. The Company collected these letters and forwarded them to the Union. About 130 such letters were collected over a period of several months.

Dennis Norman testified credibly that he signed a letter of resignation in Beckley on January 6, his first day of work for the Respondent. The Respondent began the operation of each crew with an orientation session which, at Beckley, took place at the Hylton Hotel. While still at the hotel, Lucas asked Norman, in the presence of other employees, to resign from the Union. He supplied Norman with sample language, as well as the paper to be used for the resignation. Norman wrote out the resignation in his own handwriting and handed it to Lucas.

Donald Wood, who was not hired until the end of February, credibly testified that Bolen spoke to him in the presence of three crew members and asked all of these employees if they wanted to sign out of the Union. Wood refused. He also testified that Bolen was angry when he departed. Some 2 or 3 weeks later, Wood was riding in a vehicle with his crew chief, William Stacey, when the subject of resignation was brought up by Stacey. Stacey told Wood that he might as well resign from the Union since nobody else in the Company was for it. He offered to provide Wood with the paper to do so. The document in question already contained resignation language. Wood testified that he said that he had family and needed to work and his refusal might cause some problems so he told Stacey he would resign and he did so.

About February 1, Gregory S. Crook signed a letter of resignation from the Union at his jobsite on North Sandbranch Road. Both Cadle and Lucas drove up to where Crook was working and handed him a piece of paper with resignation language already written on it. He copied the text of the document on to another piece of paper and returned it to them. Sometime in February, at the jobsite, Bolen asked Daniel Harris if he wanted to resign from the Union. Harris replied that he did not. He asked Bolen if resigning was a condition

[9] In the summer, the Respondent employs spray crews which are normally two-man operations.

of continued employment. Bolen said it was not, to which Harris replied that he guessed he would stay with the Union.

On two or three occasions, Bolen asked Eugene Osborne if he would resign from the Union. Osborne declined, telling Bolen only that he ''would think about it.'' Bolen persisted, telling Osborne that, if he did want to resign, he should simply write on a piece of paper ''I, Eugene Osborne, resign out of Local 732,'' and place his signature on the paper. Later, his crew chief, Jeff Donathan, in Bolen's presence, asked Donathan's entire crew to resign. No one did so.

Leonard F. Goode Jr. and members of the crew to which he was assigned were approached by Bolen to resign from the Union sometime after Goode was employed. The conversation took place at a jobsite on Herndon Mountain. Goode replied that he did not care to resign and the other members of the crew gave the same reply. On his first day of employment, Lonnie Shrewsbury and other employees had a conversation with General Foreman John Baker concerning various items relating to their job, including company insurance and drug testing. Baker asked him and others if they wanted to resign from the Union. Shrewsbury replied no, whereupon Baker simply said he just thought he would ask. Sometime in January, Spry asked Richard White and other crew members if they wanted to resign from the Union. They declined. A day or so later, Spry told crew leader Marvin Dalton, in Shrewsbury's presence, that if any of his foremen went union they would not have a job. In February, Chamblis, in the presence of Spry and General Foreman Lando Adkins, asked members of the crew to which White had been assigned if they wanted to resign from the Union. He said he had resignation papers with him and anyone who wanted to sign one could fill it out and resign. White again refused.

On February 10, Bruce Collins' first day on the job, Chamblis asked him, as well as the crew to which he was assigned, if they wanted to resign from the Union. The whole crew refused. At a jobsite at Workman's Fork, Spry asked the crew to which Brian K. Messer had been assigned if they wanted to resign from the Union. Spry suggested that they write out their resignations on a piece of paper and sign it. Messer replied that he would ''think about it.'' Several weeks later, Chamblis, Adkins, and Spry again spoke to the same crew about resigning. These foremen all insisted that nothing would change if they resigned and asked employees to copy down the text of a proposed resignation on a piece of paper and sign their names to it. Messer and one other employee did so, but only after Spry spoke to him a second time and Adams told him that it could cost him his job if he did not do so.

When Chamblis interviewed Carl Adams for a job, Chamblis told him that the Company never had a union, did not expect to have one, and did not need one. Adams eventually became crew chief. On one occasion, Chamblis came out to the site where his crew was working, accompanied by Spry and Adkins. After discussing certain safety questions, Chamblis told the crew that he had a piece of paper with him containing resignation language. He asked employees to copy the language and sign it. He explained that he was going around to other crews asking them to resign and that the men he had talked with said that the Union had never done anything for them. Adams signed a resignation slip.

5. The refusal to hire Ray Reed

Ray Reed has worked in the tree-trimming business since 1966, both in West Virginia and elsewhere. Between 1979 and 1981, he was a crew foreman when Asplundh held the maintenance contract with APCO. Reed then worked in the coal mining industry for the next 3 years. In December 1984, the Respondent hired him as crew foreman when it regained the APCO maintenance contract from Asplundh. Later, Reed went to work as a crew chief for Asplundh when it once again became APCO's maintenance contractor in 1987. He remained in that position until the Asplundh contract expired on December 31, 1991. During the final months of his employment, Reed worked under the supervision of Bolen in the latter's capacity as an Asplundh general foreman.

The Union organized Asplundh employees in 1987 and, as noted previously, was certified in October of that year as bargaining agent following a Board-conducted election. Reed was active in that campaign on behalf of the Union and served as union observer at the representation election. He held various positions in Local 732, first as vice president, later as president, as well as a member of the union negotiating team that negotiated two contracts with Asplundh. He was reelected president of the Local in 1991.

On December 16, 1991, Reed applied for a job with the Respondent along with other applicants who appeared at the Holiday Inn in Bluefield. He was interviewed by Jeff Nicely, the Respondent's claims manager. I credit Reed's testimony to the effect that, during the interview, Bolen was sitting immediately behind Nicely in the interview room. Based at least in part on Bolen's recommendation, Reed's application was turned down by Griffin on the night of the interview.

After hiring by the Respondent had begun, Reed phoned Bolen[10] and asked him when the Respondent was going to hire everyone back. Bolen replied that the Company had already done so. Reed objected, insisting that a lot of Asplundh employees had not been hired. Bolen then told him that Wilson was doing the hiring and that he—Bolen—had nothing to do with it. Bolen suggested to Reed that he contact Johnny Griffin. Reed asked Bolen how he could get in contact with Griffin. Bolen replied that he did not know. Bolen went on to say that Wilson would be on the job for the next 4 years and, during that time, Reed would not be hired because Wilson was only going to hire people with good work records who keep production up. Reed then asked Bolen if the Company had any problem with his work record. Bolen replied in the negative, saying that Reed had an excellent work record. He told Reed bluntly that ''you and I know'' the reason Reed would not be called back to work. Reed said he understood but asked Bolen to do what he could to get the other Asplundh employees back to work.

6. The refusal to hire Galen Clay

Galen Clay had worked for Wilson between 1982 and 1986 as a crew chief or foreman when Wilson was the APCO maintenance contractor. He went to work for Asplundh in 1987 when Asplundh took over the contract and was employed by Asplundh as either a crew foreman or a

[10] Bolen denies most of the conversation as recounted by Reed. I discredit Bolen, who was a biased and thoroughly unreliable witness.

groundsman.[11] Clay suffers from dizziness when working at heights so he never climbed trees during his employment with either Wilson or Asplundh, a problem well known to both Asplundh and Wilson. During his tenure with Asplundh, Clay worked in both the Beckley and Bluefield Divisions.

During the 1987 representation election campaign, Clay energetically supported the Union. After it was selected, Clay served as both secretary-treasurer and one of the Union's stewards. In the latter capacity, he filed approximately nine grievances on behalf of unit employees and attempted to adjust these grievances with Asplundh Supervisors Lucas, Cadle, and Jesse Furry.

In December 1991, Clay appeared at the hiring interview in Beckley and applied for a job with the Respondent along with several other Asplundh employees. He was never offered a job. Shortly after the Respondent's operation began, Clay called Cadle and asked if Cadle knew when Clay might be called back to work. Cadle's reply was that all the crews were full. He placed a second call a few weeks later and again asked Cadle when he might be coming back to work. Again Cadle replied that all the crews were full. Clay then called Lucas and posed the same question to Lucas. Lucas replied that he did not know when Clay might be recalled. In none of these conversations was any mention made of Clay's inability to climb or was any reason given to Clay for the Respondent's refusal to recall him.

Respondent points out that its contract with APCO provides that any groundsman hired by the Respondent should be able to ''trim trees under direction.'' The contract requirement relating to a ''working crew leader'' requires a crew leader to ''instruct and supervise trimmers or groundspersons under his responsibility; prepare time sheets and other reports.'' The job application form presented by the Respondent to all applicants stated that any employee ''must be able to work at heights more than 50' above ground.''

7. The discharge of James L. Arnett

Arnett worked for Asplundh as a climber in the Bluefield Division. He applied for a job in mid-December during the mass interviews which took place at the Holiday Inn in Bluefield. He was not hired until the last week in February and was assigned to a crew headed by Teddy Lester. The other members of the crew were Jackie Lester, the brother of Teddy Lester, and Anthony A. Pruitt. Shortly after being hired, Arnett asked his crew chief about letters of resignation from the Union, asking T. Lester whether the latter had signed such a letter. T. Lester gave no reply.

Arnett rode to work with T. Lester in T. Lester's pickup truck. I credit Arnett's testimony that on a Monday morning, about 2 or 3 weeks after he had been hired, he appeared at the pickup point, as usual, and started to get into T. Lester's truck. T. Lester told Arnett not to get in, informing Arnett that he had to let him go. Arnett questioned the statement so T. Lester said, ''I was told to let you go. I ain't got nothing to do with your work or anything like that. I was just told to let you go.'' And with that statement he drove away.

Later on in the day, Arnett drove to Welch, West Virginia, where Lester's crew was working, in order to retrieve his raincoat and some other personal property. He saw Lester in a truck and told him, ''I'd like to know what is going on. Are you firing me or laying me off?'' Lester replied, ''We're firing you for taking your hardhat off and looking up in a tree and putting it back on.'' Arnett then asked, ''Is that the only reason?'' At this point, Lester said, ''No, I've got a bunch of them and that's all I'm going to tell you.'' Arnett then threatened to go to the unemployment office and to the Labor Board. Lester's only comment was, ''I don't care. Go ahead.''

The following Thursday, Arnett went to a meeting place where employees gather to receive their paychecks. Lester presented Arnett with a termination slip and asked him to sign it. The form was a company termination notice which stated that James L. Arnett was being discharged on March 9, 1992, for a safe practice violation. The form also contained a written description outlining the violations:

3/4/92 Drop starts chain saws
2/25/92 Don't want to wear hard hat
3/4/92 Makes poor use of time
2/26/92 Doesn't want to wear safety glasses
3/5/92 Don't want to follow orders

The form was signed by Lester. Written on the form were places for Pruitt and Jackie Lester to sign as witnesses. They did so, dating their signatures 3/9/92. Arnett told Lester the form was all lies and refused to sign it.

8. The Respondent's delay in hiring Ray Mendez, Daniel Harris, Bill Dean Collins, Bruce Collins, and Charles Simmons

Discriminatees Mendez, Harris, Bill Collins, Bruce Collins, and Charles Simmons were former Asplundh employees who had applied for jobs with the Respondent. During the Asplundh years they all held positions in the Union. At the time of the changeover, Mendez was a shop steward in the Logan Division; Harris was a trustee and member of the Union's executive board; Bruce Collins was a shop steward in the Mingo area, a part of the Logan Division; Charles Simmons was a shop steward in the Bluefield Division; and Bill Dean Collins had been a shop steward in the Mingo area during 1991 before Bruce Collins assumed that responsibility. In that capacity B. D. Collins had filed grievances on behalf of fellow employees. As noted before, the Respondent began its operations in early January and, by January 10, had hired 70 or 71 individuals. Of that number, approximately 20 were either new hires or were transferees from the Respondent's Virginia operation. The above-named discriminatees were employed or offered employment on the following dates:

Mendez—February 7
Harris—February 10
Bruce Collins—February 10
Bill D. Collins—February 10
Simmons—February 24

In terms of service in the industry or with Asplundh before coming to the Respondent, Simmons worked 2 years as a groundsman and as a climber in the Bluefield Division. Harris worked nearly 5 years for Asplundh as a climber, a trim-

[11] Before working for either Asplundh or for Wilson, Clay had worked 11 years for Bartlett, another tree company, as a groundsman.

mer, and a trim lift foreman in the Bluefield Division. Bruce Collins, who is now a foreman or crew leader with the Respondent on a split dump truck crew, worked for Asplundh, although the record is silent as to the timing and extent of his employment. Bill Dean Collins worked off and on for Asplundh in the Mingo or Logan Division for about 7 years as a groundsman and as a trimmer. Mendez worked for Asplundh during its various contract terms for nearly 10 years as a groundsman in the Logan Division.

B. *Analysis and Conclusions*

1. The agency status of Teddy R. Lester

The Respondent insists that Teddy R. Lester and all other crew chiefs are foremen and have one or more indicia of supervisory authority which makes them supervisors within the meaning of the Act. This assertion is vigorously contested by the General Counsel. However, the General Counsel contends that Lester was a nonsupervisory agent of the Respondent whose statements should be attributed to the Respondent despite his asserted status as a rank-and-file employee. There is little doubt, both from Arnett's testimony and from Lester's own testimony as well as from the termination notice which was placed by the Respondent in Arnett's file, that the Respondent utilized the services of Lester to effectuate Arnett's discharge. Whether or not Lester used independent judgment in actually determining Arnett's fate—thus acting as a supervisor—will be discussed later. Because Lester was utilized by the Respondent to effectuate Arnett's discharge, he was its agent for that purpose, so any remarks or statements made by him in that activity are attributable to the Respondent, irrespective of any broader considerations relating to Lester's status.

2. The supervisory status of crew chiefs

A pivotal question in this case—and one of the most difficult to resolve—is the status of the crew chiefs, whom the Respondent refers to as foremen. They directly oversee the trimming and clearing crews employed by the Respondent on the APCO properties and are, at the very least, leadmen in crews made up of two or three other individuals. Historically, they were included in the Asplundh bargaining unit and were covered by the terms and conditions of the Asplundh contract with the Union. In fact, some crew chiefs held union offices. Respondent claims that, upon taking over the maintenance responsibilities in three APCO divisions, it assigned to crew chiefs sufficient additional responsibilities to enable it to treat them as supervisors within the meaning of Section 2(11) of the Act.

The burden of proving that any individual is a supervisor within the meaning of the Act falls upon the party making the contention, in this instance the Respondent. *Bowne of Houston*, 280 NLRB 1222 (1986); *Chicago Metallic Corp*., 273 NLRB 1677 (1985); *Opelika Foundry*, 281 NLRB 897 (1986). The statutory criteria for supervisory status are set forth in Section 2(11) of the Act and have been the subject of extensive litigation since they were included in the 1947 amendments. It has long been held that the various criteria therein are set forth in the disjunctive and that the actual exercise of any one of those functions is sufficient to constitute the individual supervisor, even if he does not exercise all of the functions which define supervisory status. However, there must be actual exercise of supervisory authority to invest an individual with statutory supervisory status. Respondent points out that its personnel manual, available to all employees including crew leaders, contains instructions to crew leaders (referred to therein as foremen) which invest crew leaders with supervisory status.[12] However, abstract, theoretical, or rule book authority does not transform an employee into a supervisor. *Advanced Mining Group*, 260 NLRB 486 (1982). To put it another way, job descriptions are not determinative of the question. *NLRB v. Security Guard Service*, 384 F.2d. 134, 147 (5th Cir. 1967). What is determinative is whether, in the exercise of one or more of the indicia of supervisory authority, the individual in question actually exercises independent judgment on behalf of his employer. *Chicago Metallic Corp*., supra. In making these determinations, the Board recognizes that it has a duty not to construe supervisory status too broadly because any person who is deemed to be a supervisor is denied the rights accorded to employees under the Act. *Matheson Fast Freight*, 297 NLRB 71 (1989). In this case, if crew leaders were deemed to be supervisors, the Union would be deprived of much of its in-house leadership.

Certain factors have often been employed by the Board to assist it in determining true supervisory status. While not determinative of the issue in and of themselves, these factors are often illuminating as to whether or not the individual in question truly falls within the definition contained in Section 2(11). One such factor is whether or not the individual in dispute receives a salary and/or company bonuses or is hourly rated. Likewise, whether individuals working under the

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[12] The company manual states:

> You as foreman are directly responsible for hiring new employees. This part of your job is one of the most important parts for the continued success of our company. You should select men who are neat; and seem to have the personal drive to succeed, and who are interested in a job with a future. Be choosey, select the best men. . . . You should continually be alert to the possibility of needing another employee and should hire dependable men who will work when you need them, and who will carry their fair share of the work.
>
> . . . .
>
> You should plan your work for the day and inform your crew so that they know what to do as soon as you arrive at the job site. . . . Proper planning and careful supervision of your crew will also eliminate some of the hazards of your job.
>
> . . . .
>
> You should watch your men while they work and correct them if they make a mistake or do something in an unsafe manner. In order to maintain the highest production you must be aware of what each of the men are doing, inspect the work as it is completed, and never leave a job half done. . . . You should make your instructions clear and to the point, so that your men will not have any trouble carrying them out.
>
> . . . .
>
> Training involves developing men to be fully effective in their present jobs and preparing them for advancement to greater responsibilities. . . . Care in selecting a new man can save you a lot of trouble later.
>
> . . . .
>
> No one likes to be criticized before fellow employees. Always be constructive in your criticism.
>
> From time to time disputes are likely to occur on your crew. These should be settled immediately with those involved. DO NOT let disputes get out of hand. Be FIRM and FAIR to both parties. Trouble makers should be dismissed immediately.

supervison of a purported supervisor perform routine duties throughout the day without being told repeatedly what to do has a bearing on the question. *Memphis Furniture Mfg*., 232 NLRB 1018 (1977). The Board has often considered the ratio of supervisors to employees in a particular bargaining unit in evaluating whether a claimed supervisor actually is entitled to such status. An inordinately small ratio has often been deemed to be strong evidence that supervisory authority really does not exist while an inordinately large ratio has been deemed to be strong evidence that others beside admitted supervisors have actually been invested with the authority recited in Section 2(11). *Welch Farms Ice Cream*, 161 NLRB 748 (1966); *Memphis Furniture*, supra; *United Electrical & Mechanical*, 279 NLRB 208 (1986); *Golden Fan Inn*, 281 NLRB 226 (1986). One problem presented in this case which sets it apart from most supervisory determination cases is that the Respondent is asserting, on the basis of the testimony of a few individuals and the statements in its personnel handbook, that an entire class of employees are supervisors in the face of testimony of several members of that class that they do not in fact exercise the authority claimed for them. In most instances, a Board determination is limited to a particular individual based upon a record developed to reveal his particular duties and responsibilities. Recently, the Fifth Circuit stated:

> [The employer] first argues that because the Board found that three of the individuals in the bargaining unit classification of foreman were supervisors, all in the classification of foreman must be treated as supervisors because all generally occupy the same hierarchial position in the organization. [The employer] has not persuaded us with any authority that this postulation represents the law on the subject. An employee's specific job title and station in the organization is not automatically controlling. The employee's actual authority and responsibility determine whether he is a supervisor. [Emphasis in the original.] [*NLRB v. Dickerson-Chapman, Inc*., 140 LRRM 2854, at 2857 (1992).]

Lastly, bargaining history is a factor to be considered in any unit determination, including a unit placement determination, even though the history of the continuing unit embraces more than just the employer who is a party to the dispute.

In this case the Respondent, upon taking over the maintenance contract for the three APCO divisions in West Virginia, hired 19 employees, all but one of whom had been Asplundh employees, titled them foremen, gave them manuals which outlined various supervisory duties they were to perform, and told them they could hire or fire. They filled the role of bargaining unit crew leaders in the previous employer's operation and continued to be working leaders of crews which ranged from a total of three to a total of four individuals. They were hourly rated, paid at a rate substantially above the amounts paid to groundsmen and climbers on their crew. They were placed under the supervision of salaried general foremen, who were admitted supervisors, and an operations manager who controlled them through their salaried supervisors. At the same time, the Respondent hired a total of 50 other employees who were admittedly rank-and-file bargaining unit members. If these 19 individuals (and others with a similar designation) are found to be supervisors, the Respondent would have an inordinately low supervisory ratio (including general supervisors and the manager) of less than 4 to 1. If not, the Respondent would have a supervisory ratio about 14 to 1, which is a little high but not beyond perameters found in cited Board cases.

A number of employees, including some present crew leader-foremen summoned by the General Counsel, credibly testified that the job performed by the Respondent's crew leaders was no different, or only slightly different, from the job performed by Asplundh crew leaders. Two of the Respondent's leaders insisted that they could hire employees although no one testified credibly that they could fire or had fired anyone without first clearing it with at least a general foreman. Any participation on their part in the firing process was simply to carry out an instruction given to them by either the operations manager or a general foreman. As for hiring, most of those who indicated that they hired individuals, when pressed, admitted that they had only recommended an individual for hire who, in some instances, might be hired or might not be. I discredit Teddy Lester's testimony relating to his authority to perform supervisory functions. As for Jeffrey Donathan, he testified that he had hired four individuals but, upon further examination, admitted in two of those instances he merely recommended the individuals in question and someone else actually did the hiring. As for the two individuals he claims to have hired without consultation with superiors, such testimony may establish that Donathan himself might well be a supervisor but it is far from establishing than any other crew leader has actually exercised such authority.

With respect to issuing reprimands, some crew leaders and others testified that crew leaders have issued reprimands only when instructed to do so. One testified that he issued a particular reprimand upon instruction from the general foreman although he had told the general foreman that he did not want to do so. Others said that they, or their foremen, had issued reprimands on their own, although most of these reprimands were related to attendance. This testimony at best indicates that crew leaders, in fact, have issued reprimands only on an occasional, perfunctory basis involving minor matters and have done so without the consistent exercise of independent judgment required of a true supervisor. For the most part, crew leader-foremen perform manual labor and exercise surveillance over employees only for instructional purposes in the case of new hires. The paperwork associated with their jobs takes only a few minutes each day. The rest of the time they spend performing bargaining unit work.

One troubling result in a finding that crew leaders are employees and not supervisors is that these tree-trimming and brush-cutting crews roam about APCO properties at considerable distances from their general foremen and are visited by these actual supervisors perhaps once a day or three times a week, depending upon which witness one feels is most accurate in his description. However, the work they perform is routine, difficult but not skilled, and by and large is performed by men with many years of experience who need and receive little or no actual supervision from anyone during the course of a normal workday. In many respects, these crews resemble the telephone maintenance crews whose crew chiefs or foremen were found to be unit personnel in *NLRB v. Dickerson-Chapman, Inc*., supra.

This situation also resembles one which confronted the Fourth Circuit in *NLRB v. Southern Bleachery & Print*

Works, 257 F.2d 235 (1958). In that case, skilled printers, called machine printers, who had been treated for many years as nonsupervisory employees, were given a list of instructions which invested them with the responsibility of checking on timecards of other workers, recommending hiring, firing, and pay increases for other employees, and taking necessary steps to report, reprimand, or recommend disciplinary actions for violation of company rules. They were also given a pay increase at the same time. Speaking for the court, Judge Soper wrote:

> Our attention is called to certain decisions of the courts which point out that the definition of the term ''supervisor'' in the Act is phrased in the disjunctive so that an employee who has the authority in the interest of the employer to perform any of the enumerated acts in the exercise of independent judgment acquires the status of a supervisor, and also that the question of status is determined by the existence of the power rather than by the frequency of its exercise. It is equally clear, however, that the employer cannot make a supervisor out of a rank and file employee simply by giving him the title and theoretical power to perform one or more of the enumerated supervisory functions. The important thing is the possession and exercise of actual supervisory duties and authority and not the formal title. It is a question of fact in every case as to whether the individual is merely a superior workman or lead man who exercises the control of a skilled worker over a less capable employee or is a supervisor who shares the power of management. In this case we have the unquestioned fact that, after 1950 as before, the machine printers did the actual work of operating the machine and directing actitivies of their helpers and also that during both periods a number of supervisors, assistant supervisors, and foremen exercised authority over the printers. If the Board, taking these facts in consideration, accepted the testimony of witnesses for the Board that the new authorities given to the printers on June 5, 1950, were largely of a routine or perfunctory nature, it cannot be said that the findings were unwarranted by the evidence or are without support in the decision of the court. [Citations omitted.] [Supra at 239.]

In light of these precedents and the facts in thls record, I conclude that the Respondent's crew chiefs or crew foremen are not supervisors but bargaining unit employees who are entitled to the protections afforded to employees by Sections 7 and 8 of the Act.

3. The Respondent as a successor to Asplundh

Respondent claims that it is not a successor to Asplundh because it is performing maintenance chores for APCO differently than Asplundh did, namely by investing crew chiefs with additional supervisory functions that somehow constitute the current operation as being radically different from the one which preceded it. This contention, even if factually supported, is frivolous and has no bearing on the question of successorship. In light of the above findings relating to crew chiefs, the facts in this case define a classic example of a successorship. The key to a determination of whether a new employer on an old scene is or is not a successor is whether the work the new employer is performing is the same work that its predecessor performed. In this case, the Respondent is performing the identical work that Asplundh performed, for the same contractor, in many of the same localities, just as the work which Asplundh performed was the same work that the Respondent had performed 4 years earlier when it held the APCO maintenance contract. The size of both work forces is about the same. The Respondent's initial work force carried over all four general foremen whom Asplundh employed. A vast majority of those hired to inaugurate the Respondent's operation were Asplundh employees. Indeed, the Respondent's principal recruiting effort prior to the outset of its APCO contract was to solicit applications from Asplundh employees. As found above, the slight variation in responsibilities between former and present crew chiefs is inconsequential. Crews are still made up of crew chiefs (now called foremen), climbers or trimmers, and groundsmen. The situation presented here is, in every material particular, identical to the one found in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), in which the Supreme Court, affirming the Board, found the existence of a successorship when one guard contractor took over a security contract from another guard contractor and hired a majority of its predecessor's employees to perform the same work at the same location. There was, in the Beckley, Bluefield, and Logan divisions of APCO, a substantial continuity of the employing industry when the Respondent commenced its maintenance contract in early January. Accordingly, the Respondent was and is Asplundh's successor.

When the Respondent started work in early January 1992, some 52 of its 70 or 71 unit employees were former Asplundh employees. All Asplundh employees were members of the Union under the Asplundh contract and had to be, inasmuch as the Asplundh contract contained a conventional union-security clause requiring union membership after 30 days of employment. Since a majority of the Respondent's employees were union members at the time the Union made its demand for recognition and bargaining, the Respondent was under a duty to recognize the Union as their bargaining agent and to negotiate with the Union a contract covering the terms and conditions of employment of unit employees.[13]

4. When the duty to bargain arose

In *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987), the Supreme Court upheld the Board's rule that the duty of a successor to recognize and bargain with the Union representing the employees of its predecessor arises at the point in time when the new employer has hired a representative complement of employees to carry on its own operation. In *Fall River*, this duty was found to exist when the new employer had hired employees in virtually all job classifications and had hired at least 50 percent of those whom it would

[13] The Court observed that a successor may normally set its own wage rates and other terms and conditions of employment when recruiting employees. It does not follow from this premise that a successor may also transfer bargaining unit work out of the unit by attempting to promote unit employees to the position of working supervisors without bargaining with the designated bargaining representative, or that a successor may do so for the purpose of eviscerating a unit and diminishing a union's bargaining power.

ultimately employ in a majority of its job classifications. In this case, the Respondent, as well as its predecessor, had only three permanent classifications—crew leader (foreman), climber or trimmer, and groundsman. By January 10, it had hired employees in all of those classifications. It had also hired 60 percent of its total-required complement of employees. Tested by the *Fall River* standard, on January 10 the Respondent had a representative complement of its work force on its payroll and, accordingly, was under a duty to recognize and bargain with the Union.[14] By failing and refusing to honor the Union's demand at that time, the Respondent violated Section 8(a)(1) and (5) of the Act.

5. The resignations from the Union by Respondent's employees

As part of its hiring process, Respondent's interviewers told all applicants from the ranks of Asplundh employees that it was a nonunion company and intended to stay that way. These remarks were not casual expressions of opinion. They were emphatic announcements of company policy, made at a critical moment in each prospective employee's career as a right-of-way maintenance man when he was about to lose one job and was anxious about obtaining another. These systematic announcements coincided with the Respondent's formal response to the Union's demand for recognition, namely that it was a nonunion company and was going to take every legal means to remain as such.

These statements by interviewers were not the last words that Respondent's employees heard on the subject of unionization. Shortly after operations began, Chamblis, the area manager, visited each jobsite not merely to reiterate the message received by each employee during the hiring process but to follow up with a suggestion that any employee could resign his membership in the Union. He then offered to provide each employee with the physical means of doing so. This was done notwithstanding the fact that few if any of the Respondent's employees had made any overtures to indicate that they were interested in resigning; indeed, many refused to do so. After Chamblis completed his effort, a second try was then made by general foremen to obtain the resignations of those whom Chamblis was unable to prevail upon. All of this was done against a background of strong animus and other violations of the Act, discussed infra, and was performed by supervisors or managerial employees of the Respondent on a widespread, systematic basis.

While an employer may, under certain circumstances, lawfully provide an employee with information concerning the mechanics of resigning from a union, this Respondent went far beyond either giving advice or accommodating requests. It pursued its employees relentlessly until many of them simply acceded to its pressure and signed resignations. The Respondent did so on a wholesale basis as a matter of company policy and practice. In so doing, it unlawfully solicited employees to resign from their union in violation of Section 8(a)(1) of the Act. Its behavior also rendered the resignations invalid as a means of rebutting a determination of majority status based upon union membership during the contract period of the Respondent's predecessor. Moreover, the Respondent's unlawful refusal to recognize and bargain with the Union on and after January 10 and its violations of Section 8(a)(3) of the Act, hereinafter discussed, provide additional context which renders these resignations null and void. I so find and conclude.

6. The independent violations of Section 8(a)(1) of the Act

a. *The status of Asplundh general foremen before January 1, 1992, as agents of the Respondent*

The Respondent points out that its general foremen—Bolen, Cadle, Spry, and Lucas—were employees of Asplundh throughout the month of December 1991, and did not come on the Respondent payroll until it assumed responsibility for the APCO contract on January 1, 1992. From this fact the Respondent argues that it was not vicariously responsible for anything these individuals may have said or done before January 1 because, during that period of time, they were Asplundh's foremen, not the Respondent's. The argument is disingenuous.

Early in December, the Respondent contacted these individuals and discussed with them their possible employment as its general foremen. It then invited them to a meeting with its labor counsel on December 11, at which time they were informed, along with all of the Respondent's existing and admitted supervisors, what they could do and not do in carrying out the Respondent's policy of resisting unionization ''by every legal means.'' At hiring interviews which took place in mid-December, all of these Asplundh foremen were present and assisted the Respondent in conducting the interviews by handing out the Respondent's application forms to Asplundh employees and, in some instances, assisting those employees in filling out their applications. Following the interviews, these individuals, though still Asplundh supervisors, gave their recommendations to Respondent's management about who should be hired and when, where, and in what jobs they should be hired. Since they had personal knowledge of the past performance and capabilities of Asplundh employees and the Respondent's upper management did not, it necessarily follows that the Respondent was forced to place heavy reliance upon their evaluations and recommendations. In light of these factors, it is clear that Bolen, Cadle, Spry, and Lucas were nonsupervisory agents of the Respondent during December 1991, while they were still on

[14] One string in the Respondent's bow is the contention that it had no duty to recognize the Union because the demands for recognition made upon it by the Union were not for recognition in an appropriate bargaining unit, inasmuch as the demands purportedly attempted to include crew leaders whom the Respondent insists are supervisors within the meaning of the Act and not properly includable in any bargaining unit. The certification, as well as the unit description contained in the Asplundh contract, was for ''employees engaged in line clearance work'' in the respective APCO divisions. It made no reference to crew leaders as such; the certification, as with all Board certifications, excluded supervisors within the meaning of the Act. Rice's demands for recognition tracked the language of the Asplundh contract and the certification. It was for ''employees engaged in line clearance work'' in the affected APCO divisions and nothing more. As such, they were demands relating to classifications contained in the certification. If, as the Respondent contends, its crew leaders are supervisors, then this question can be addressed either in a unit clarification proceeding or otherwise, but it has no bearing on the validity of the certification or the unit description in Rice's carefully crafted demand letters. As noted above, the necessary legal premise for the Respondent's defense in this regard is also missing.

the Asplundh payroll and that the Respondent is vicariously liable for their acts and statements while acting in that capacity.

b. *The violations committed by these and other agents*

The Respondent herein violated Section 8(a)(1) of the Act by the following acts and conduct of its supervisors and agents:

(1) When Bolen told Reed that the Respondent was not going to hire everyone and that people who were crybabies and who had filed grievances were not going to be hired, he clearly insinuated that the Respondent would not hire individuals who had engaged in union or concerted protected activities. Such a statement violates Section 8(a)(1) of the Act. In light of the Respondent's other actions and statements, I equate the phrase ''crybaby'' with such phrases as ''bad attitude'' which the Board has long held to be a pejorative description of union sympathy or union activity by an antiunion employer.

(2) When Bolen repeated the above-quoted remarks to Reed's crew, he violated Section 8(a)(1) of the Act. He again violated Section 8(a)(1) when he repeated these remarks to a work crew at Woody's Quick Stop.

(3) When Griffin stated to several employees at a job interview to several employees that the Company was nonunion and was going to stay that way, he was intimidating employees and in effect telling them that union activity on their part would be futile. Such a statement violates Section 8(a)(1) of the Act.

(4) In the context in which they were uttered, the remarks made to job applicants by the Respondent's interviewers that the Respondent was nonunion and intended to stay that way was more than an expression of policy but a threat to refuse to bargain with the Union regardless of circumstances. Such a threat is a violation of Section 8(a)(1) of the Act.

(5) When Cadle personally asked Thompson to sign a letter of resignation from the Union as they were standing in a parking lot getting ready to drive Asplundh trucks to Charleston, he was not responding to any request or suggestion on Thompson's part but was soliciting an employee to abandon his support for a labor organization and to do so in writing. Cadle's act of dictating the contents of the letter and then taking it from Thompson for the purpose of forwarding it to the Respondent confirmed the unlawful nature of his request. Such a solicitation violates Section 8(a)(1) of the Act.

(6) When Bolen asked Arnett and Osborne at a gas station where they were going, he was coercively interrogating employees concerning their union activities in violation of Section 8(a)(1) of the Act. When he disputed their answer and told them that they were in fact going to a union meeting, he was engaging in surveillance of union activities in violation of Section 8(a)(1) of the Act. When, a few days later, Bolen asked Arnett why he had attended a union meeting, he was again engaging in coercive interrogation in violation of Section 8(a)(1) of the Act.

(7) When, at the Hylton Hotel in Beckley, Lucas asked Norman to resign from the Union and supplied him with appropriate language and paper to be used in writing the resignation, he unlawfully solicited an employee to resign from the Union in violation of Section 8(a)(1) of the Act.

While various individual acts on the part of Bolen and others in soliciting employees to resign from the Union have been recounted in the factual analysis in this decision, separate findings of violations by them are not necessary and will not be made since an overall finding has been made, supra, that both Chamblis and general foremen unlawfully solicited employees under their supervision and control to resign from the Union.

7. The refusal of the Respondent to hire Ray Reed

The Respondent's announced standards for hiring new employees were experience, competence, and, to a limited extent, geography, in that the Respondent wanted to place employees in areas where they had previously worked and which were not too distant from their homes. All applicants had to possess a driver's license and had to pass a drug test, which was normally administered after the employee was on the payroll. Reed had about 25 years' experience in the industry and had worked several years as a crew foreman, not only for Asplundh but for the Respondent itself. Notwithstanding this fact, he was not hired for any position, including that of crew chief or foreman. In fact, his application was rejected by the Respondent on the night it was submitted. When, after a number of employees were hired, Reed asked his former general foreman, Bolen, why he had not been hired, Bolen replied, ''You know why.'' On that occasion, Bolen also told Reed that, as his superior during the Asplundh contract, he had experienced no difficulty with Reed's performance as crew chief. Bolen changed his story when he testified.

Reed was a high profile union supporter, in that he was president of the Local. In contrast, the Respondent, to whom he applied for employment, gave strong evidence of animus throughout the hiring process and thereafter, violating the Act repeatedly with little concern for the provisions of law or the rights of its employees. It is against this background that the Respondent's excuse for not offering Reed a job must be evaluated. Bolen admitted on the stand what he had told Reed privately, namely that he had never complained about Reed's job performance during the period of time that he was Reed's supervisor under the Asplundh contract. However, Bolen attempted to explain his failure to voice any concern about Reed to their former employer on the basis that Reed was the Union's in-house leader and he had been told by Asplundh's higher management to ''lay off'' Reed for that reason.[15] He justified the Respondent's refusal to hire Reed on the basis that, during the Asplundh contract, Reed's crew had ''poor production.'' This judgment was not based on any personnel or performance records obtained from Asplundh, but on an evaluation assertedly made by APCO, whose superintendents periodically go out into the field and make spot checks of maintenance crews in order to verify the statistics contained on weekly production reports concerning the number of trees trimmed or felled and the yardage of brush which has been cut. APCO's June 13 and August 29, 1991 evaluations of Reed's crew were satisfactory. However, the December 12 and final evaluation given to Reed's crew contained mixed results. Two members of a four-member evaluating crew, including Bolen, rated the crew's performance during that period unsatisfactory, while others disagreed

[15] This statement was never corroborated by any member of Asplundh's management. As Bolen was a consistently untruthful witness, I discredit his testimony in this regard.

or would not comment. The evaluation in question consisted of 20 separate ratings. Of those ratings, Reed's crew rated satisfactory in 17 categories while, as noted, three were unsatisfactory in the opinion of two members of the rating group. The General Counsel brought out on cross-examination that Asplundh Crew Chief Teddy Lester, who was hired by the Respondent and who testified for the Respondent in this proceeding, received on his final evaluation as an Asplundh crew leader only 5 satisfactory ratings and some 14 unsatisfactory ratings. The disparity in treatment between Reed and T. Lester—hiring one individual as a crew chief who had poorer ratings while refusing to offer Reed any kind of a position—illustrates that the excuse given by the Respondent in Reed's case was a transparent pretext and that its real reason for keeping Reed off its payroll was its desire to deprive its employees of the in-house union leadership which it knew Reed could provide. Accordingly, by denying Reed employment because of his membership in and activities on behalf of the Union, the Respondent here violated Section 8(a)(1) and (3) of the Act.

8. The refusal of the Respondent to hire Galen Clay

Like Reed, Clay had previously worked not only for Asplundh but for the Respondent as well. He had been employed either as a groundsman or a crew chief. The record is silent as to any complaint about his work in either capacity during this lengthy period of time. It was well known that Clay would not climb trees because of dizziness he experiences while working at heights. He was never called upon to do so by either of his previous employers.

Respondent claims that its new job requirements were dictated by APCO, who wanted every groundsman to be able ''to trim trees under direction.'' However, APCO specified no similar responsibility for crew chiefs employed by its maintenance contractors. Respondent interprets this contractual requirement as one which requires every employee to work at great heights. This is only an argument; the APCO requirement is not so explicit and, more to the point, there is no suggestion in the record that APCO ever laid upon all employees employed by its contractors the same requirement that the Respondent did.

Upon taking over the APCO maintenance contract in January 1992, Wilson imposed a job requirement that all employees, regardless of classification, be able to climb 50 feet or more. It did not insist on such a requirement during its previous tenure as maintenance contractor in West Virginia. Admittedly Clay did not and could not meet that requirement. However, the record contains other instances in which other employees did little or no climbing and were not required to do so as the price of obtaining or retaining their jobs with the Respondent. Respondent admits that the requirement that all employees be able and willing to climb is not so much a work-related requirement, imposed in order to permit the Respondent to carry out its functions efficiently, but a safety-related requirement designed to ensure that someone would be available in case other employees became injured or disabled while up in a tree and had to be removed. This is a thin justification, since all maintenance crews are composed of several individuals, most of whom are able to climb. The Respondent is entitled to a thin justification for a job requirement but it is not entitled to apply it disparately, and this is what the Respondent has done with respect to Clay. It did not offer Clay a position on any of its summer brush-spraying crews, where it had employed several individuals who do no climbing at all and are never asked to climb.

Clay was a union activist and a leading union official who had many years of creditable experience in tree-trimming and right-of-way maintenance work. He was denied employment by an employer who ostensibly was looking for ability and experience in fashioning its maintenance crews but whose overarching concern was to avoid dealing with the Union and to eliminate unionism from its workplace, not only by any legal means but by any available means. I conclude that the Respondent's refusal to hire Clay because he would not and could not climb was a pretext and that its real reason for refusing to hire him was his union leadership. Such a refusal is a violation of Section 8(a)(1) and (3) of the Act.

9. The discharge of James L. Arnett

Arnett was an experienced climber but his length of service in the maintenance business did not approach that of either Reed or Clay. He was an Asplundh employee who was hired about 7 weeks after the Respondent commenced its operations. He was discharged 2 or 3 weeks later. He worked on a crew headed by T. Lester, T. Lester's brother, Jackie, and Pruitt. Their testimony is no more reliable than T. Lester's, whose testimony I have already discredited. Arnett was not a union officer but he was a union member who refused T. Lester's request that he execute and sign a written letter of resignation from the Union.

In his brief period of service with the Respondent, Arnett was charged with several safety violations of a trivial character which ostensibly served as the basis of discharge. None of these violations were brought to his attention at the time they occurred, a fact which suggests that they were dredged up for purposes of litigation after a decision had been made to remove him. The reasons set forth on Arnett's discharge slip are at a marked variance with what T. Lester told Arnett when he informed him of the discharge—''It ain't got nothing to do with your work or anything like that. I was just told to let you go.''

Arnett had been supplied by the Respondent with defective safety equipment and had complained about the strap on his hardhat and his safety glasses. He was obligated to remove them, at least temporarily, in order to do his job. With respect to drop starting chainsaws, the evidence is clear that all employees drop start chainsaws from time to time and that there is no evidence whatsoever that anyone who has done so has been disciplined in any way. With respect to the incident that supposedly sealed Arnett's fate, I find it preposterous that Arnett was discharged for removing a tree that he was only supposed to trim when he was not directed to cease cutting it down while he was in the process of doing so. Such lack of oversight is certainly not in accord with the close supervision of employees which Respondent's handbook imposes on its crew foremen.

As in the cases of Clay and Reed, the discharge of Arnett presents one more instance of a virulently antiunion employer seizing upon a pretext, or a collection of pretexts, in order to eliminate from its ranks a known union adherent. Accordingly, I find that the Respondent discharged Arnett because of his union sympathies and activities and, in so doing, violated Section 8(a)(1) and (3) of the Act.

10. The delay in hiring Mendez, Harris, Bill Dean, Collins, Bruce Collins, and Simmons

As noted above, the Respondent insists that its sole criteria for hiring both its initial crew member and others who were employed later on were experience, ability, and, to a lesser extent, geography. In hiring more than 70 employees in early January, it overlooked the five employees named above, notwithstanding their experience in the industry and the fact that all of them had been employed by Asplundh in the areas in which they were eventually hired. Instead, preference in making up the initial crews was given to 13 new hires—men who had never before worked for either Asplundh or the Respondent—and to 6 individuals who were transferred into West Virginia from the Respondent's staff in Virginia. All five individuals included in this portion of the consolidated complaint were union stewards or trustees, a matter which Respondent insists is irrelevant, immaterial, and coincidental.[16]

In light of the Respondent's unyielding and militant determination to avoid bargaining with the Union, which included an outright refusal to hire the Union's two leading adherents, I am unwilling to believe that any action which had the effect of discriminating against a group of union leaders as a class was purely coincidental. Certain individual explanations were given as to why certain less experienced individuals were hired in preference to these employees but no explanation exists as to why so many out-of-state employees and inexperienced employees were hired in preference to the bulk of the Union's leadership group. In the face of Respondent's oft-repeated assertion concerning the hiring criteria it purportedly followed, the initial employment of inexperienced and out-of-state job applicants stands as a flat contradiction of announced principle because so many experienced, local individuals were available and anxious to work. By its delay in hiring Ray Mendez, Daniel Harris, Bill Dean Collins, Bruce Collins, and Charles Simmons because of their membership in and activities on behalf the Union, the Respondent again violated Section 8(a)(1) and (3) of the Act.

On the foregoing findings of fact and conclusions of law, and upon the entire record herein considered as a whole, I make the following

CONCLUSIONS OF LAW

1. Wilson Tree Company, Inc. is now and at all times material herein has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union of Electronic, Electrical, Salaried, Machine, and Furniture Workers, AFL–CIO–CLC, and its Local 732, are, respectively, labor organizations within the meaning of Section 2(5) of the Act.

3. All employees employed by the Respondent in servicing its Appalachian Power Company contract in the Logan, Beckley, and Bluefield, West Virginia divisions, including crew chiefs, trimmers, groundsmen, and systems crew employees, but excluding mechanics, office clerical and professional employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. Since on or about January 10, 1992, the Union herein has been the exclusive collective-bargaining representative of the Respondent's employees employed in the unit found appropriate in Conclusion of Law 3 for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By failing and refusing to recognize and bargain collectively with International Union of Electronic, Electrical, Salaried, Machine, and Furniture Workers, AFL–CIO–CLC, and its Local 32 as the exclusive collective-bargaining representatives of its employees employed in the unit found appropriate in Conclusion of Law 3, the Respondent has violated Section 8(a)(5) of the Act.

6. By failing and refusing to hire Ray Reed and Galen Clay; by discharging James L. Arnett; and by delaying the hiring of Ray Mendez, Daniel Harris, Bill Dean Collins, Bruce Collins, and Charles Simmons because of their membership in and activities on behalf of the Union, the Respondent violated Section 8(a)(3) of the Act.

7. By the acts and conduct set forth above in Conclusions of Law 5 and 6; by coercively interrogating employees concerning their union activities; by engaging in the surveillance of the union activities of employees; by soliciting employees to resign their membership in the Union; by threatening to refrain from hiring individuals who had engaged in union activities and concerted protected activities; and by telling employees that the Respondent would never recognize or bargain with the Union under any circumstances the Respondent violated Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices have a close, intimate, and adverse effect on the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent herein has engaged in certain unfair labor practices, I will recommend that it be required to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes and polices of the Act. Since the independent violations of Section 8(a)(1) of the Act found herein are repeated and pervasive and evidence an attitude on the part of this Respondent to behave in total disregard of its statutory obligations, I will recommend to the Board a so-called broad 8(a)(1) remedy designed to suppress any and all violations of that section of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979). The recommended Order will also recommend that the Respondent be required to offer full and immediate employment or reinstatement to Ray Reed, Galen Clay, and James L. Arnett, and that it make them and Ray Mendez, Daniel Harris, Bill Dean Collins, Bruce Collins, and Charles Simmons whole for any loss of earnings which they may have sustained by reason of the discriminations practiced against them, in accordance

[16] Among the Respondent's many contentions is the claim that it did not even know who was or was not a union officer or member, other than in the case of Reed and Clay. Its four general foremen, who had worked for Asplundh, who assisted the Respondent in selecting Asplundh employees for hire, and who were eventually employed by the Respondent as general foremen were well aware of who had been union officers, union stewards, and union members. The contract between the Union and the Respondent's predecesser required all employees to be union members after 30 days of employment. This fact was also well known to everyone involved in the Asplundh operation. Such knowedge is legally imputable to the Respondent. I have no doubt that it had actual knowledge as well.

with the *Woolworth* formula,[17] with interest at the rate prescribed by the Tax Reform Act of 1986 for the overpayment and underpayment of Federal income tax. *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent's standard reply to the Union's demands for bargaining was that it would not do so until the Union filed a representation petition and won a representation election. This is a particularly inappropriate requirement in a case such as this one, where rapid turnover of maintenance contractors means that a new employer may potentially be servicing APCO in West Virginia every 3 or 4 years. The whole thrust of the successorship doctrine is designed to provide some stability in labor relations by focusing on the continuity of the bargaining unit rather than the identity of a succession of employers. Where, as here, a majority of employees have continued to work in the same unit for a series of companies, or more accurately an alternating pair of companies, requiring an election every time APCO grants a maintenance contract to another company would not only be seriously disruptive of labor relations but would, as in the instant case, provide an employer who is bent on destroying a union majority and ousting it from the bargaining unit a handy ploy for accomplishing its illegal purpose. As a practical matter, procedural delays in holding elections and in vindicating employee rights following an election would mean, in the circumstances of this bargaining unit, that employees would never be able to organize and bargain collectively because, once they had established their right to do so, as with the Asplundh Company, they would immediately be faced with the necessity of doing so again with another contractor, thus experiencing additional delays to the effort to obtain a new certification. For this reason, the Board and the courts have relied on the successorship doctrine to avoid questions concerning representation when the real question at issue is the destruction of employee rights under the Act by illegal employer activities.

In addition to the above recommended remedy, I will also recommend that the Respondent be required to post the usual notice, advising its employees of their rights and of the results in this case. In light of the unusual feature of this case, namely that the Respondent's office is the area manager's home and that employees work in separate crews in widely dispersed locations, I will recommend that signed copies of the notice be posted for the required period of time in each crew chief's truck.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Respondent, Wilson Tree Company, Inc., and its officers, agents, supervisors, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees concerning their union activities or the union activities of other employees.

(b) Soliciting employees to resign from a labor organization.

(c) Telling employees that they or other employees will not be hired because they have engaged in union or concerted protected aciivities.

(d) Telling employees that it will never recognize or bargain with the Union under any circumstances.

(e) Engaging in the surveillance of the union activities of any employee.

(f) Discouraging membership in or activities on behalf of International Union of Electronic, Electrical, Salaried, Machine, and Funiture Workers, AFL–CIO–CLC, and its Local 732, or any other labor organization by discharging employees, refusing or delaying the hiring of employees, or otherwise discriminating against them in their hire or tenure.

(g) Refusing to recognize and bargain collectively in good faith with International Union of Electronic, Electrical, Salaried, Machine, and Furniture Workers, AFL–CIO–CLC, and its Local 732 as the exclusive collective-bargaining representative of all of the Respondent's employees employed in servicing its Appalachian Power Company contract in the Logan, Beckley, and Bluefield, West Virginia divisions, including crew chiefs, trimmers, groundsmen, and systems crew employees, but excluding mechanics, office clerical and professional employees, guards, and supervisors as defined in the Act.

(h) By any other means or in any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to Ray Reed, Galen Clay, and James L. Arnett full and immediate employment or reinstatement to their former or substantially equivalent employment, without prejudice to their seniority or to other rights they have previously enjoyed, and make them and Ray Mendez, Daniel Harris, Bill Dean Collins, Bruce Collins, and Charles Simmons whole for any loss of pay or benefits suffered by them by reason of the discriminations found herein, in the manner described above in the remedy section.

(b) Recognize and, on request, bargain collectively in good faith with International Union of Electronic, Electrical, Salaried, Machine, and Furniture Workers, AFL–CIO–CLC, and its Local 732 as the exclusive collective-bargaining representatives of the Respondent's employees in the unit set forth above.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

(d) Post at the Respondent's Beckley, West Virginia office and in all company trucks driven by crew chiefs copies of the attached notice marked ''Appendix.''[19] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately

[17] *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.